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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, et al.,

Plaintiffs,

v.

ROB BONTA, et al.,

Defendants.

Case No. 5-22-cv-00335-FLA (GSJx)

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Motion Hearing on May 27, 2022, at 1:30pm, as Noticed with Judicial Officer Twyla Freeman

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INTRODUCTION

For 2,500 years the medical profession has forbidden doctors from giving patients lethal drugs. Society relies on this prohibition—trusting physicians to be healers when possible and to provide comfort when healing is no longer possible. In the last 30 to 40 years, hospice and palliative care organizations have developed advanced techniques to control the physical, psychological, social, and spiritual distresses that so often affect individuals approaching death. The common goal is life with dignity until natural death occurs.

This life-affirming care for the dying is embodied in the Hippocratic Oath. Various translations of the original Oath are available, but they all contain something like the following: "I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan[.]" Michael North, *Greek Medicine*, NATIONAL LIBRARY OF MEDICINE (2002), https://bit.ly/3KH2Lkp.

Despite historical condemnations of physician involvement in suicide, California legalized it in 2015. CAL. HEALTH & SAFETY CODE § 443 (End of Life Options Act). The original Act included important safeguards to ensure that healthcare professionals would not have to participate. But six years later, SB 380 redefined "participation" in a way that removes those safeguards. Religious objectors now must provide information about suicide availability to requesting patients and participate in the prescribed process for subjecting terminally ill patients to drugs enabling them to kill themselves.

Christian Medical & Dental Associations' members, including Leslee Cochrane, M.D. (collectively "CMDA" or "CMDA members") have personal religious

convictions and professional ethical beliefs opposing the practice of assisted suicide. They cannot facilitate it in any way. So SB 380 is violating and chilling CMDA members' fundamental constitutional rights protected by the First and Fourteenth Amendments. An injunction is required to stop this irreparable harm while litigating this case.

STATEMENT OF FACTS[1]

CMDA members' religious and ethical convictions

CMDA members like Dr. Cochrane live out their Christian beliefs in their practice of health care, including their belief in the sanctity of human life. It would violate their consciences to participate in assisted suicide in any way. CMDA members in California work in the hospice setting or specialize in oncology so they often treat patients with terminal diseases. Others work in specialties including cardiology, internal medicine, and family medicine, and also treat patients with terminal diseases. Over 90% of CMDA members would rather stop practicing medicine than participate in assisted suicide.

One of those California members, Dr. Leslee Cochrane, M.D., is a full-time hospice physician who is board certified in family medicine with a certificate of additional qualification in hospice and palliative medicine. In his job as a full-time hospice physician, Dr. Cochrane sees terminally ill patients daily and must engage in discussions with them about their diagnosis, prognosis, and treatment options. He works in a hospice that does not provide assisted suicide, though it does serve

[1] Facts in this brief are in the Verified Complaint unless otherwise indicated.

patients interested in it. Neither he nor any other physician at the hospice will participate in assisted suicide in any way.

Some of Dr. Cochrane's terminally ill patients can experience temporary physical, mental, or emotional distress that lasts longer than the two da waiting period for access to suicide drugs. This distress may cause exhaustion that leaves them vulnerable to being easily manipulated to commit suicide.

The original End of Life Options Act

Despite the historical prohibition against physician participation in suicide, the End of Life Options Act took effect in 2016, legally authorizing the practice of physician-assisted suicide in California. *See* CAL. HEALTH & SAFETY CODE §§ 443, *et seq.* The original Act provided broad protections for conscientiously declining "participation" with no caveats:

> Notwithstanding any other law, a health care provider is not subject to civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability for refusing to participate in activities authorized under this part, including, but not limited to, refusing to inform a patient regarding his or her rights under this part, and not referring an individual to a physician who participates in activities authorized under this part.

Id. at § 443.14(e)(2) (as enacted in 2015, available at https://bit.ly/35fDUER).

SB 380's amendments to the End of Life Options Act

SB 380 amended the Act to require a physician whose patient requests assisted suicide to document the request in that patient's medical record, even if the physician objects to facilitating assisted suicide in any way. *Id*. at § 443.14(e)(2). That

documentation will satisfy the first of two oral request requirements for assisted suicide. *Id.* at § 443.3(a).

SB 380 also requires a conscientiously objecting "health care provider" to "at a minimum, inform the individual that they do not participate in [assisted suicide], …and transfer the individual's relevant medical record upon request." *Id*. at § 443.14(e)(1), (2). Another provision of SB 380 requires objecting physicians to timely refer the patient to a physician who will participate. *Id*. at § 443.15(f)(3)(C). They also must diagnose the terminal illness, inform the patient of the diagnosis, determine the patient's capacity, and provide the patient information about assisted suicide. *Id.* at § 443.15(f)(3)(A) & (B).

Physicians, such as Plaintiffs, who refuse to participate in assisted suicide in these ways are open to "civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability[.]" *Id*. at § 443.14(e)(3). And they do not have the same protection from Medical Board complaints that participating physicians do. *Id.* at § 443.15(g) ("The fact that a health care provider participates under [California's physician-assisted laws] shall not be the sole basis for a complaint or report of unprofessional or dishonest conduct" in violation of California's Business and Professions Code).

SB 380's effect on the Plaintiffs

SB 380 requires objecting physicians like CMDA members to participate in assisted suicide by:

a. Documenting the date of a patient's initial assisted suicide request;

b. Providing information to a patient about the availability of assisted suicide;

c. Informing the patient that they do not participate in assisted suicide;

d. Transferring the patient's records including documentation of that first oral request to a subsequent physician who may participate in assisted suicide; and

e. Providing a requesting patient with a referral to another provider for the purpose of providing assisted suicide.

Id. at §§ 443.14(e)(2), 443.14(e)(4), 443.15(f)(3). This compelled conduct and speech violates CMDA members' rights of free exercise of religion, freedom of speech, due process, and equal protection. They are suffering irreparable discriminatory treatment based on their religious convictions and the chilling of religious freedom and free speech.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When it comes to infringements on individuals' constitutional rights, "[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury," and that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up).

ANALYSIS

The U.S. Supreme Court specifically recognized protection for medical professionals' conscientious objection to taking a life in *Roe v. Wade*. It quoted the AMA House of Delegates resolution that, "[N]o physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles." 410 U.S. 113, 143 n. 38 (1973).

Protecting health care professionals from forced participation in acts that violate their "good medical judgment" or "personally-held moral principles" is prevalent in our laws and jurisprudence. Since the 1970s, the "Church Amendments" (42 U.S.C. §§ 300a-7(b)–(e)), the Weldon Amendment (Sec. 507(d) of Title V of Division H (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2016 Pub. L. No. 114-113), and the Affordable Care Act (42 U.S.C. §§ 18023(b)(4), 18113(a)), have all contained provisions protecting medical rights of conscience.

When the U.S. Supreme Court considered whether there is a "fundamental right" to physician-assisted suicide in *Washington v. Glucksberg*, it agreed with the AMA that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." 521 U.S. 702, 731 (1997) (quoting AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § 2.211 (1994), available at

https://bit.ly/35gicR9).[2] This is consistent with the Court's staunch protection conscientious objectors in other areas like refusing to work on the Sabbath and production of war materials. *Sherbert v. Verner*, 374 U.S. 398 (1963) (coercing employees to work on the Sabbath Day in order to obtain unemployment benefits violated the Free Exercise Clause); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) (similar holding regarding producing tank turrets).

I. The Plaintiffs are likely to succeed on the merits of their constitutional claims.

A. Plaintiffs are likely to succeed on the merits of their free exercise claim because SB 380 treats secular doctors better than religious doctors and treats some religious beliefs more favorably than others.

The Free Exercise Clause forbids the government from imposing "special disabilities on the basis of religious views or religious status." *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Laws that burden religiously motivated conduct are subject to strict scrutiny if they are not generally applicable or not religiously neutral. *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 546 (1993). SB 380 fails this test.

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[2] AMA's code of ethics still holds that "[p]hysician assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks." AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § 5.7. The Code also says, "Preserving opportunity for physicians to act (or refrain from acting) in accordance with the dictates of conscience…is important for preserving the integrity of the medical profession …[P]hysicians should have considerable latitude to practice in accord with well-considered, deeply held beliefs that are central to their self-identities." CAL. HEALTH & SAFETY CODE § 1.1.7.

Laws targeting religion are only the baseline of what the Free Exercise Clause of the First Amendment protects. In other words, "[b]ad motive may be one way to pursue a violation, but first and foremost, *Smith-Lukumi* is about objectively unequal treatment of religion and analogous secular activities." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210 (2004). Laws burdening religiously motivated conduct are subject to the highest level of scrutiny under the Free Exercise Clause when they lack neutrality or general applicability. *Smith*, 494 U.S. at 879.

1. SB 380 impermissibly burdens CMDA members' exercise of religion.

To trigger Free Exercise protection, CMDA need only show that SB 380 burdens its members' religion. *Lukumi*, 508 U.S. at 531. SB 380 burdens CMDA members' free exercise of religion by requiring them to facilitate assisted suicide. CAL. HEALTH & SAFETY CODE §§ 443.14(e)(2), 443.14(e)(4), 443.15(f)(3). This is a prototypical burden that is substantial. *See Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 720-22 (2014) (requiring companies to cover abortifacients in their employee health insurance plans substantially burdened their religious beliefs not to facilitate abortion).

2. SB 380 is neither neutral nor generally applicable.

SB 380 is not neutral and generally applicable because it: (1) is gerrymandered to single out religious conduct for disfavored treatment, *Lukumi*, 508 U.S. at 532–40; and (2) applies differential treatment among religions. *Id*. at 536.

a. SB 380 is impermissibly gerrymandered.

A law is impermissibly gerrymandered against religious individuals like CMDA members when it favors secular conduct, *Lukumi*, 508 U.S. at 537, or "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends." *Id*. at 538. SB 380 suffers from both maladies.

SB 380 protects physicians participating in assisted suicide from "censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty" with no exceptions. § 443.14(b)-(c). But protection for religiously objecting, non-participating physicians is limited. SB 380 parrots the original Act's promise that "a person or entity that elects, for reasons of conscience, morality, or ethics, not to participate is not required to." CAL. HEALTH & SAFETY CODE § 443.14(e)(1), (2). But it redefines "participate" to leave those non-participating physicians open to "civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability" for failing to take actions that facilitate assisted suicide. *Id*. at § 443.14(e)(3).

The allowance for not having to "participate," as now defined by SB380, is drafted so narrowly that it requires CMDA member complicity in the very thing their beliefs prohibit. They now must fulfill requirements for and participate in the approval process of assisted suicide through diagnosing the terminal illness, documenting the suicide request (which is the first of two oral request requirements), providing information about assisted suicide availability, and referring to a doctor who will provide it. *Id*. at §§ 443.14(e)(1)-(2) & 445.15(f)(3).

Moreover, non-objecting physicians who fully participate have added protection from Medical Board of California complaints. "The fact that a health care provider participates under [California's physician-assisted laws] shall not be the sole basis for a complaint or report of unprofessional or dishonest conduct" in violation of California's Business and Professions Code. *Id.* at § 443.15(g). No such protection exists for religiously objecting physicians whose failure to participate *can* be the sole basis for a complaint of unprofessional or dishonest conduct.

SB 380 also violates more religious convictions than necessary to achieve its goal of ensuring easier access to assisted suicide. *Lukumi*, 508 U.S. at 542 (law hindering "much more religious conduct than is necessary in order to achieve the legitimate ends asserted in [its] defense," is "not neutral."). The original End of Life Options Act provided broad protections for physicians conscientiously declining participation. CAL. HEALTH & SAFETY CODE at §§ 443.14(e)(2) (as enacted in 2015, available at https://bit.ly/35fDUER). There were no exceptions requiring physicians to facilitate assisted suicide through diagnosis, documentation, provision of information, and referral. SB 380's new protections for religious objectors are not supported by legislative findings that the previous comprehensive protection was problematic. In other words, the Act now violates more religious exercise than necessary to achieve its ends. This is evidence of improper religious targeting subject to strict scrutiny. *Lukumi*, 508 U.S. at 538 ("We also find significant evidence of the ordinance's improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends.")

In fact, the Senate Committee on Health's analysis of the bill warned that the California Medical Association would likely not support SB 380's limited conscience protection: "This bill redefines 'participation,' including the requirement of informing and referring, which would severely threaten the autonomy of physicians, removing a true conscious objection and opt out." Senate Judiciary Committee Executive Summary on SB-380 at 8-9, CALIFORNIA LEGISLATIVE INFORMATION (April 16, 2021), https://bit.ly/3H1KbBj. The analysis admitted that such a requirement "arguably did not strike the right balance" and "raised constitutional questions with respect to freedom of speech and the free exercise of religion." *Id.*

SB 380 is not neutral. It is strategically gerrymandered to subject CMDA members to liability because their religious beliefs prohibit participating in assisted suicide through diagnosis, documentation, provision of information, and referral.

b. SB 380 treats some religiously objecting physicians more favorably than others.

A second way to prove a law is not neutral is to show that it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. There is no need to show the government favors one creed over another. *Larson v. Valente*, 456 U.S. 228, 246 (1982) (striking law treating "well-established churches" more favorably than "churches which are new"); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (striking law treating "sectarian" universities more favorably than "pervasively sectarian" universities).

As shown in the previous subsection, SB 380 allows physicians to not participate in assisted suicide so long as the physicians' beliefs align with the more narrow definition of "participate." SB 380 accommodates those who don't object to referring for assisted suicide, providing information about its availability, and documenting patient assisted-suicide requests. But SB 380 does not accommodate physicians like CMDA members whose religious convictions prohibit facilitating assisted suicide in these ways. This discriminatory treatment shows SB 380 is not neutral and generally applicable and therefore violates CMDA's free exercise rights.[3]

3. SB 380 violates the Free Exercise Clause because respect for rights of conscience is rooted in the Religion Clauses.

SB 380 does not respect rights of conscience which are rooted in the Religion Clauses. In *Thomas*, the Court protected an employee's religious conviction not to participate in the taking of life by making weapons of war. 450 U.S. at 714. That holding furthered the Free Exercise Clause's protection of religious liberty and was consistent with the Establishment Clause principle of neutrality. *Id.* at 718-20.

Smith did not overrule *Thomas* but distinguished it because denial of unemployment benefits based on religious belief is not "an across-the-board criminal prohibition on a particular form of conduct." 494 U.S. at. 884. Thirty-one years later,

[3] *Smith* should be overruled because it distorts a proper understanding of the Free Exercise Clause. In *Kennedy v. Bremerton Sch. District*, U.S. Supreme Court No. 18-12, four Justices suggested that a future case should revisit that decision. 139 S. Ct. 634 (Mem) (2019) (Alito, J., joined by Thomas, J., Gorsuch, J., and Kavanaugh, J.). *See* generally Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

the Court clarified that even "a neutral law of general applicability" is unconstitutional if it violates engrained First Amendment principles. "The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (refuting the notion "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause.") That is why the government cannot use even neutral, generally applicable nondiscrimination laws to compel clergy "to perform" a same-sex wedding. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

Like the employee in *Thomas*, CMDA members' religiously motivated conscientious refusal to facilitate taking a life is rooted in the First Amendment Religion Clauses. Respecting it furthers religious liberty protected by the Free Exercise Clause and complies with the government's obligation to remain neutral in matters of religion required by the Establishment Clause. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972) (cleaned up) (striking down mandatory high school education law's application to Amish children because it violated the Religion Clauses).

Moreover, compelled speech that violates religious beliefs is unconstitutional. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking mandatory pledge

of allegiance recitation because it violated students' religious beliefs prohibiting swearing allegiance to any entity other than God). This makes sense because the freedom to communicate one's beliefs—and to decline to contradict them—is a core component of the right to "profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877.[4]

Physicians' refusal to assist with suicide is nothing new. They have taken Hippocrates' Oath for two millennia, swearing, "To please no one will I prescribe a deadly drug nor give advice which may cause his death." HISTORY OF EUTHANASIA, https://bit.ly/3KMkJlx (last visited March 24, 2022). And "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Glucksberg*, 521 U.S. at 711. In fact, "[b]y the time the Fourteenth Amendment was ratified [in 1868], it was a crime in most States to assist a suicide." *Id.* at 715. And nearly a hundred years later, the first Model Penal Code included assisted suicide as a crime. Thaddeus Pope, *Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures*, 38 N.M. L. REV. 267, 272 (2018), available at https://bit.ly/36m1v7H\. Limited acceptance of physician-assisted suicide is a very recent phenomenon and still a minority view. It

[4] At a minimum, CMDA's claim "falls into the class of 'hybrid situations' in which 'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech,' can 'bar application of a neutral, generally applicable law.'" *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019) (quoting *Smith*, 494 U.S. at 881–82) (cleaned up)..

came on the scene in the 1980s and 90s, *id.* at 274-82, and only 10 states and the District of Columbia now permit it under limited circumstances.[5]

SB 380's dismissal of thousands of years of medical tradition amplifies the violation. CMDA's conscience rights rooted in the Religion Clauses along with SB 380's lack of neutrality and general applicability require strict scrutiny. *Lukumi*, 508 U.S. at 546. CMDA is likely to succeed on its free exercise claim because Defendants cannot clear this highest of constitutional bars.

4. SB 380 cannot survive strict scrutiny.

Under strict scrutiny, "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (cleaned up). In applying strict scrutiny, courts "look[ ] beyond broadly formulated interests" and instead "scrutinize [ ] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vogetal*, 546 U.S. 418, 431 (2006).

California must "identify an 'actual problem' in need of solving." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). It has not done so here. There is no rational, much less compelling, reason to discontinue or narrow the original Act's

[5] CAL. HEALTH & SAFETY CODE §§ 443 to 443.9 (West 2016); 2016 COLO. REV. STAT. §§ 25-48-101 to 25-48-123; D.C. CODE §§ 7-661.01 to 7-661.16 (2017); HAW. REV. STAT. §§ 327L-1 to 327L-25 (2019); ME. STAT. tit. 22 § 2140 (2019); N.J. REV. STAT. §§ 26:16-1 to 26:16-20 (2019); N.M. STAT. ANN. §§ 24-7C-1 to 24-7C-8 (West 2021); OR. REV. STAT. §§ 127.800 to 127.897 (2017); VT. STAT ANN. tit. 18 §§ 5281 to 5293 (West 2013); WASH. REV. CODE §§ 70.245.010 to 70.245.903 (2009). *Baxter v. State*, 354 Mont. 234, 239, 251 (Mont. 2009), allows physicians to raise a consent defense in assisted suicide cases.

conscience protections. And there is no compelling interest to support the differential treatment of religious objectors based on how complicit they are willing to be with physician-assisted suicide.

Under strict scrutiny, the government must also show the law "is the least restrictive means of achieving" its interests. *Thomas*, 450 U.S. at 718. If means less burdensome on religious freedom exist, the government "must use [them]." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). California previously protected religious objectors from facilitating physician-assisted suicide and no evidence shows that protection caused any harm to the State's interests. *Hobby Lobby*, 573 U.S. at 730–31 (noting that the government had shown its ability to provide an exemption to the Petitioners because it had granted such an exemption to a different class of religious objectors). This protection was "workable," *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and much "less restrictive" of religious freedom, *Playboy*, 529 U.S. at 824. SB 380 is not narrowly tailored so it fails strict scrutiny. CMDA is likely to succeed on its free exercise claim.

B. Plaintiffs are likely to succeed on their free speech claim because SB 380 compels speech facilitating assisted suicide and discriminates against CMDA members based on speech content and viewpoint.

1. SB 380 unconstitutionally coerces CMDA members to speak the State's message on assisted suicide to their patients.

The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *Barnette*, 319 U.S. at 637). As a result, the First Amendment protects not only the right of a speaker to choose what to say,

but also the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)) (cleaned up).

SB 380 requires CMDA members to provide information about the availability of, and refer for, assisted suicide. CAL. HEALTH & SAFETY CODE §§ 443.14(e)(2), 443.14(e)(4), 443.15(f)(3). But healthcare professionals enjoy First Amendment rights within their practice and content-based professional speech regulations are subject to strict scrutiny. *Nat'l Inst. of Family and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) (enjoining law requiring pro-life medical facilities to refer for abortion). Even a doctor who publicly advocates a treatment the medical establishment considers outside the mainstream is entitled to robust protection under the First Amendment. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (affirming injunction prohibiting government from threatening revocation of a physician's license for recommending medical use of marijuana). So too here where CMDA members' views are mainstream. The Supreme Court agrees with the AMA that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." *Glucksberg*, 521 U.S. at 731 (quoting AMA, Code of Ethics § 2.211 (1994)).

SB 380 forces physicians to affirm that assisted suicide may be indicated for a six-months "terminal" condition, and suggest that assisted suicide is morally appropriate for a diagnosed "terminal" condition. CMDA members strenuously disagree with both statements as a matter of medical practice and as a matter of medical ethics, and desire to remain silent on the subject or only engage in speech

that discourages suicide. Declaration of Jeffrey Barrows, D.O. ¶ 5.

That a healthcare professional may also express his or her own conflicting views to the patient is irrelevant for First Amendment purposes. "One who chooses to speak may also decide what not to say." *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014). Listeners may think the message is the healthcare professional's speech, and thereby impute the State's message to the healthcare provider. *Id*. at 246. Regardless, healthcare providers need not "affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576. That violates speaker "autonomy." *Id.*

Patients put their trust in physicians and healthcare professionals, and tend to regard their statements with a heightened degree of credulity. Barrows Decl. ¶ 6. "The court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener." *Stuart*, 774 F.3d at 250; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974) (forcefully rejecting attempt to "[c]ompel[] editors or publishers to publish that which 'reason tells them should not be published'").

Likewise, in *Riley*, the Supreme Court recognized that forcing a speaker to begin his relationship with an unwanted disclosure, as the state tried to do with charitable solicitors in that case, imposes a severe harm to free speech rights because a negative message may end the communicative relationship before it begins. *Riley v. Nat'l Fed. of the Blind of N.C. Inc.*, 487 U.S. 781, 799-800 (1988).

Because SB 380 coerces CMDA members to communicate messages that facilitate assisted suicide even though they believe it to be medically contraindicated and morally wrong, SB 380 likely violates the First Amendment's protection against

compelled speech.

2. SB 380 unconstitutionally regulates and compels speech based on content and viewpoint.

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. "We therefore consider [laws mandating speech]' to be 'content-based regulations.'" *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014) (quoting *Riley*). Content-based speech regulations are, in turn, presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Conant*, 309 F.3d at 637–38 (deeming content-based restrictions on professional speech presumptively invalid).

SB 380 is also directed against the viewpoint of religious healthcare professionals regarding assisted suicide. *Conant*, 309 F.3d at 637 (policy against discussing medical marijuana was viewpoint-based because it condemned expression of a particular viewpoint, "i.e., that medical marijuana would likely help a specific patient"). Physicians who document assisted suicide requests, provide information about its availability, and refer to physicians who will provide it are under no threat from the State because SB 380 removed civil, criminal and regulatory liability for such conversations. CAL. HEALTH & SAFETY CODE § 443.14(c). But those who refuse to engage in this speech for reasons of conscience risk losing their livelihoods.

"Viewpoint discrimination is [] an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829

(1995). Viewpoint discrimination is a "blatant" First Amendment violation. *Id*.

"In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell v. IMA Health, Inc.*, 564 U.S. 552, 571 (2011); *Playboy*, 529 U.S. at 817-18 (viewpoint and content-based speech restrictions are presumed unconstitutional). But at the very least, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994).

While the State has identified no "actual problem" that needs "solving," *see* Section I(A)(4), it certainly cannot show that the "curtailment of free speech" is "necessary" to address the issue, *Brown*, 564 U.S. at 799. Indeed, "It is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* (citing *Playboy*, 529 U.S. at 818). Plaintiffs are likely to succeed on their free speech claim.

C. Plaintiffs are likely to succeed on their claim that SB 380 violates their due process right to be free from impermissibly vague laws.

The Due Process Clause requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and do not "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Several terms and provisions of SB 380 are unconstitutionally vague and ambiguous and subject CMDA members to civil, criminal, and professional disciplinary action resulting in the potential deprivation of their livelihoods. No reasonable health care professional in CMDA members' position could understand the meaning of the terms "terminal disease" and "participation," as defined and used by SB 380.

"Terminal disease" is vague and ambiguous because no reasonable health care professional in CMDA members' position could know whether it means a disease that will "result in death within six months" with treatment or without treatment. CAL. HEALTH & SAFETY CODE § 443.1(r). Moreover, a national study of live discharges from hospices in 2010 found that, although there were variations based on geography and based on the type of hospice and how long it had been operating, about 1 in 5 hospice patients were discharged alive. Joan M. Teno, et al., *A National Study of Live Discharges from Hospice*, JOURNAL OF PALLIATIVE MEDICINE (October 2014), https://bit.ly/3LP57z1. No reasonable health care professional in CMDA members' position could know whether a disease is likely to "result in death within six months" to any degree of medical certainty. *Id*.

And no reasonable health care professional in CMDA members' position could understand the meaning of the phrase "[p]roviding information to a patient about this part" as used in the statute. It is unclear how much and what type of information a physician must provide to patients.

Finally, the term "participating," as used and defined by SB 380, is vague and ambiguous because no reasonable health care professional in CMDA members'

position could know what that term includes and does not include. For example, § 443.14(e)(2) says participation is not required "as defined in subdivision (f) of Section 443.15." That subdivision says "participating" does *not* include diagnosing, providing information, or referral. CAL. HEALTH & SAFETY CODE § 443.15(f)(3). But the next provision of § 443.14(e) says physicians are not subject to liability for not participating "as defined in paragraph (2) of subdivision (f) of Section 443.15." Paragraph (2) only defines what "participating" is. It makes no mention of what it is not like paragraph (3). It is not clear whether (2) necessarily includes paragraph (3), leaving CMDA members to guess if different "participating" definitions apply to § 443.15(e)(2) and (3).

Plaintiffs are likely to succeed on their claim that key provisions of SB 380 are impermissibly vague.

D. Plaintiffs are likely to succeed on their claim that SB 380 violates the guarantee of equal protection of the laws.

SB 380 treats similarly situated individuals and organizations differently in violation of the Equal Protection Clause of the Fourteenth Amendment, which "directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (cleaned up). CMDA can "prevail on [its] equal protection claim by showing that a class that is similarly situated has been treated disparately." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014) (cleaned up). Distinctions among similarly situated groups that affect fundamental rights "are given the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and discriminatory intent is presumed, *Plyler*, 457 U.S. at 216–17.

As shown in Section I(A)(2)(b) above, SB 380 favors and protects physicians unwilling to prescribe assisted suicide drugs but willing to diagnose the six-month terminal disease, record suicide requests, provide information about suicide availability, and refer to a physician who will provide it. SB 380 does not protect similarly situated objecting physicians unwilling to facilitate assisted suicide in some or all of those ways.

SB 380 also protects California physicians who participate in assisted suicide from criminal, civil, administrative, and professional liability. CAL. HEALTH & SAFETY CODE § 443.14(c). But no protection is provided for objecting physicians who refuse to participate in assisted suicide by diagnosing terminal illness, informing the patient of the illness, assessing the patient's capacity, informing the patient about assisted suicide availability, documenting a patient's request for assisted suicide, transferring a requesting patient's file, or referring the patient to a physician that will provide assisted suicide. *Id*. at §§ 443.14(e)(3), 443.15(f)(3).

SB 380 also states: "The fact that a health care provider participates under [California's assisted suicide laws] shall not be the sole basis for a complaint or report of unprofessional or dishonest conduct" in violation of California's Business and Professions Code. § 443.15(g). There is no corresponding protection for physicians who refuse to participate in assisted suicide.

Because SB 380 treats similarly situated physicians dissimilarly based on fundamental rights (religious freedom and free speech), it is subject to strict scrutiny that it cannot meet. Plaintiffs are likely to succeed on their claim that SB 380 violates the Equal Protection Clause.

II. SB 380's severe infringement of Plaintiffs' fundamental First and Fourteenth Amendment rights causes irreparable harm.

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (cleaned up). This specifically includes "[t]he loss of First Amendment freedoms, for even minimal periods of time[.]" *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (cleaned up). As established above, SB 380's discriminatory provisions deprive CMDA members of their First Amendment rights to free exercise of religion and freedom of speech, as well as their Fourteenth Amendment rights to equal protection of the law and procedural due process. The deprivation of those constitutional rights is an irreparable injury.

III. The balance of the equities and the public interest tip decidedly in CMDA's favor.

"The balance of equities and the public interest . . . tip sharply in favor of enjoining" a law that "infringes on the free speech rights not only of [the Plaintiff] but also of anyone seeking to express their views in" a particular manner. *Klein*, 584 F.3d at 1208.

First, as to the balance of the equities, any potential hardship on the government with respect to facilitating access to assisted suicide is outweighed by CMDA members' "First Amendment rights being chilled" by a law that "imposes criminal sanctions for failure to comply." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). And SB 380 exceed chilling CMDA members' speech. They face a choice between practicing medicine according to their conscience but in violation of a law subjecting them to penalties, and not practicing their livelihood in California.

Second, the court must also consider the public interest, an inquiry which "primarily addresses impact on non-parties rather than parties." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), abrogated on other grounds by *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles, as the 'ongoing enforcement of the potentially unconstitutional [law] . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people' subjected to the same restrictions." *Klein*, 584 F.3d at 1208 (quoting *Sammartano*, 303 F.3d at 974). It has even gone so far as to say that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (cleaned up).

CONCLUSION

CMDA members are likely to succeed on their constitutional claims because SB 380 violates historical policies opposing physician participation in patient suicide and legal protection for doctors who believe it is religiously, morally, and ethically reprehensible. A preliminary injunction would protect these rights from irreparable harm and further the public's interest in avoiding constitutional violations.

Respectfully submitted this 24th day of March, 2022.

By: */s/ Denise M. Harle*

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+Motion *pro hac vice* forthcoming
* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2022, I electronically filed Plaintiffs' Memorandum of Law in support of their Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notifications of such filing to and serve all parties.

s/Denise M. Harle
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